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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT FITZGERALD,

Defendant and Appellant.

D059584

(Super. Ct. No. SCS229191)

APPEAL from a judgment of the Superior Court of San Diego County, William C. Gentry, Jr., Judge. Affirmed.

I.

INTRODUCTION

Defendant Robert Fitzgerald appeals from his conviction on one count of committing a lewd act on his wife's nine-year-old daughter. Fitzgerald contends on appeal that the trial court abused its discretion in denying his motion for new trial. The motion was based on newly discovered evidence that Fitzgerald claims demonstrated that

his wife harbored ill will toward him and made false allegations of sexual impropriety against him several months before her daughter accused him of the specific crime for which he was convicted. Fitzgerald argues that the newly discovered evidence creates a strong inference that his wife was involved in helping her daughter fabricate the allegations against him.

We conclude that the trial court did not abuse its discretion in denying Fitzgerald's motion for a new trial. As the trial court found, the principal new witness lacked credibility. Beyond this, even if the newly discovered evidence were presented on retrial, a different result is not probable. We therefore affirm the judgment of the trial court.

## II.

### FACTUAL AND PROCEDURAL BACKGROUND

#### A. *Factual background*

S.P. had known Fitzgerald for a long period of time before she began dating him in February 2009. S.P. married Fitzgerald in April 2009. Fitzgerald moved in with S.P. and her three children on May 18, 2009. S.P.'s middle child, M.V., was nine years old when Fitzgerald moved in with the family.

On May 16, 2009, just before Fitzgerald moved in, M.V. went to the beach with her mother, siblings, and Fitzgerald. When the group returned home that evening, they all got into the hot tub at the apartment complex where S.P. and her children lived. S.P. and her 13-year-old daughter got out of the hot tub, leaving Fitzgerald, M.V., and S.P.'s five-year-old son in the hot tub. M.V. sat next to Fitzgerald, and he put his arm around her and placed his other hand on her "private part," over her bathing suit. According to

M.V., Fitzgerald "tapped" her vagina about three times. M.V. was scared because she knew "he wasn't supposed to do that." M.V. said that she did not know how long Fitzgerald was touching her vagina. She did not immediately tell anyone about what happened that night because she was scared.

On May 18, 2009, M.V. put on her pajamas and brushed her teeth to get ready for bed. Fitzgerald told her that when she finished getting ready for bed, she should lie down in her mother's bed with him. M.V. went into her mother's room and sat on the bed next to Fitzgerald. They watched a show in which "people build stuff" on television. At some point, Fitzgerald asked M.V. if she was asleep. M.V. responded, "No." A few minutes later Fitzgerald again asked M.V. if she was asleep. M.V. pretended to be asleep, "just to play a joke" on Fitzgerald. She closed her eyes and did not respond to Fitzgerald's question. Fitzgerald then put his hand down M.V.'s pajama pants, under her underwear, and touched her vagina in a circular motion, twice, and then left his hand there. M.V. kept her eyes closed while this was happening because she was scared. M.V. then "faked" waking up by opening her eyes. Fitzgerald took his hand out of M.V.'s clothing "real fast." M.V. told Fitzgerald that she was going to go to bed. Fitzgerald picked her up and carried her into her room. He put M.V. into bed, said goodnight, and left. That night M.V. did not tell anyone what had happened because she was scared.

The next morning, M.V. told her older sister that Fitzgerald had touched her inappropriately. M.V. was crying, shaking, and stuttering while she told her sister about the incident. M.V.'s sister had never seen her upset in that way before. M.V. asked her sister not to tell their mother, but her sister said that they had to tell their mother and

immediately went and told S.P. what M.V. had said. M.V. then told her mother what Fitzgerald had done, and demonstrated how he had touched her. Later that morning, M.V. also reported that Fitzgerald had touched her while they were in the hot tub a few days earlier. S.P. testified that she believed that M.V. was telling the truth about what had happened because Fitzgerald had touched S.P. in the same manner as M.V. had described. M.V. told S.P. that she had not immediately told anyone about these incidents because she was scared and embarrassed, and she was not sure whether S.P. would believe her.

That day, M.V. told law enforcement officers what had happened. She reported the touching in the same way that she had reported it to her sister and mother.

S.P. called Fitzgerald and told him what M.V. said he had done. Fitzgerald responded that he thought that he and M.V. had been "just playing around" and that he "might have touched her in a wrong way."

Fitzgerald testified on his own behalf and denied having touched M.V. in either the hot tub or in the bedroom.

B. *Procedural background*

The San Diego County District Attorney charged Fitzgerald with two counts of committing a lewd act on a child under the age of 14 years (Pen. Code, § 288, subd. (a)).<sup>1</sup> The information alleged that Fitzgerald had previously suffered six probation denial prior convictions (§ 1203, subd. (e)(4); two prison priors (§ 667.5, subd. (b) and 668); two

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<sup>1</sup> All statutory references are to the Penal Code unless otherwise specified.

serious felony priors (§ 667, subd. (a)(1), 668, and 1192.7, subd. (c)); and three strike priors (§§ 667, subds. (b)-(i), 1170.12, and 668).

On July 9, 2010, the jury found Fitzgerald guilty on count 2, the May 18, 2009 act. The jury acquitted Fitzgerald on count 1, the May 16, 2009 act. The jury found true two of Fitzgerald's prior convictions.

The trial court sentenced Fitzgerald to 25 years to life in prison. Fitzgerald filed a timely notice of appeal.

### III.

#### DISCUSSION

Fitzgerald contends that the trial court abused its discretion in denying his motion for a new trial, which was based on the ground of newly discovered evidence.

Following the jury's verdict, Fitzgerald moved for a new trial based on newly discovered evidence. According to Fitzgerald, the defense had discovered evidence that S.P. had solicited someone to hurt or kill him approximately eight months prior to the time that M.V. made the allegations that he had touched her inappropriately. At the hearing on Fitzgerald's motion, Fitzgerald testified, and called three other individuals to testify, as well.

Mario Gonzalez testified that he met Fitzgerald at the end of March or beginning of April 2010 while they were both incarcerated at the George Bailey Detention Center. According to Gonzalez, in October 2008, he had been watching a football game at a house in San Ysidro when a woman arrived accompanied by a little girl. Gonzalez later determined that the woman was S.P. The woman began talking about "problems" that

she was having, and said that "somebody touched her daughter." Based on the woman's comments, Gonzalez believed that she wanted to have someone injured or killed. Gonzalez "felt . . . compelled to help" the woman, and told her that if he got her "some assistance" they would "have to meet up somewhere discreet and leave it at that." The woman responded, "Okay, Diamond Jim's on Halloween," and then left.<sup>2</sup>

Gonzalez did not see S.P. again until the second week of February 2009, when they ran into each other outside of Diamond Jim's. According to Gonzalez, S.P. appeared "distraught" and "troubled," and told him that "the dude named Pony from Del Sol touched her daughter." "Pony" was Fitzgerald's nickname. Gonzalez said to S.P., "Hey, if you are serious about that I could put you in contact with somebody." S.P. apparently did not follow up with Gonzalez on his offer, and he had no further contact with her.

In June 2010, Gonzalez was in jail with Juan Jimenez. Jimenez began telling Gonzalez about Fitzgerald's problems with S.P. and M.V.'s accusations that Fitzgerald had touched her inappropriately. At some point Gonzalez realized that Jimenez was describing the woman whom he had met who had wanted someone hurt or killed. In August 2010, Gonzalez decided that he should "come forward with the evidence" so he wrote a letter to Fitzgerald about what S.P. had said to him.

Jimenez testified about his discussion of Fitzgerald's case with Gonzalez. Jimenez said that he also wrote a letter to Fitzgerald telling him what he had learned from Gonzalez.

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<sup>2</sup> The record does not reflect what type of establishment "Diamond Jim's" is.

Arnold Mesta also testified for Fitzgerald. According to Mesta, sometime in early 2009, S.P. asked Mesta whether he knew anyone who would beat up Fitzgerald. Mesta told her that he did not, and he did not ask S.P. anything more about her inquiry.

After hearing arguments from the attorneys, the trial court stated,

"With regard to the newly discovered evidence and pursuant to the factors outlined by the parties, that are recognized in case law, the factors to consider are whether or not the evidence, not merely the materiality[,] is newly discovered. And this would appear to be the case. Also, that the evidence not be cumulative—simply cumulative, but that it be [such] as to render a different result probable on retrial of the cause. And that the party could not, with reasonable diligence, have discovered it and produced it at trial, and that the facts [be] shown by the best evidence of which the case [admits].

"Having reviewed the declaration and having heard from several witnesses today, including Mr. Mesta, Mr. Gonzalez, and Mr. Jimenez, the court found Mr. Gonzalez's testimony completely lacking in credibility. I didn't believe anything he had to say.

"Mr. Jimenez's testimony presented nothing that this court believes would have an impact upon the outcome of the case had it been available at the time of trial.

"Mr. Mesta, who was a coworker of Mr. Fitzgerald's at the time, before and up to the point of his arrest, did testify that he had heard Ms. [P.] say something to the effect that she wished somebody would kick [Fitzgerald's] ass. Mr. Mesta, the court believes, was a witness that could have been discovered with reasonable diligence at the time of trial, given that he was a current coworker of Mr. Fitzgerald at the time the case was being investigated"<sup>3</sup>

The court further explained that "most of the—if not all of the material presented [at the hearing] by way of testimony and declaration centers upon [S.P.'s] motivations and credibility," and therefore "the court should note that it believes, as evidenced by the transcript of the trial, that her credibility was tested vigorously." The court continued, "And as noted by [the prosecutor,] she, in fact, invoked her [Fifth] Amendment rights during the course of the trial in front of the jury, which reasonably detracted from her credibility. To this jurist officer's mind, it was clearly a case in which the jury chose to believe the victim over the defendant." The trial court denied Fitzgerald's motion for a new trial.

" 'In ruling on a motion for new trial based on newly discovered evidence, the trial court considers the following factors: " '1. That the evidence, and not merely its materiality, be newly discovered; 2. That the evidence be not cumulative merely; 3. That it be such as to render a different result probable on a retrial of the cause; 4. That the party could not with reasonable diligence have discovered and produced it at the trial; and 5. That these facts be shown by the best evidence of which the case admits.' "

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<sup>3</sup> The court later stated that it appeared from the record that Mesta had not made himself available to the defense, but that even if he had testified at Fitzgerald's trial, the court did not believe that it would have made a difference in the jury's verdict.



[Citations.]' [Citation.] 'In addition, "the trial court may consider the credibility as well as materiality of the evidence in its determination [of] whether introduction of the evidence in a new trial would render a different result reasonably probable." [Citation.]' [Citation.]" (*People v. Howard* (2010) 51 Cal.4th 15, 43 (*Howard*).)

" ' "The determination of a motion for a new trial rests so completely within the court's discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears.' " [Citations.] " '[I]n determining whether there has been a proper exercise of discretion on such motion, each case must be judged from its own factual background.' " [Citation.]' " (*Howard, supra*, 51 Cal.4th at pp. 42-43.)

" '[W]e accept the trial court's credibility determinations and findings on questions of historical fact if supported by substantial evidence.' [Citation.]" (*People v. Verdugo* (2010) 50 Cal.4th 263, 308.)

Fitzgerald contends that the evidence he presented at the hearing on his motion for a new trial disclosed that S.P. harbored ill will toward him several months before M.V. made the accusations of sexual misconduct against him, and that S.P. had a history of making accusations that he had touched her children inappropriately when she was upset with him. According to Fitzgerald, the testimony creates an inference that S.P. was involved in helping M.V. fabricate the allegations against him.

We conclude that the trial court did not abuse its broad discretion by denying Fitzgerald's motion for a new trial. The trial court found Gonzalez's testimony to be completely lacking in credibility. Gonzalez's story made little sense with respect to the relationship history between Fitzgerald and S.P., and thus was inherently suspect. For

example, Fitzgerald and S.P. began dating in February 2009, and by all accounts the pair had a good relationship from the time they started dating until May 2010, when M.V. accused Fitzgerald of touching her inappropriately. It makes little sense that S.P. would have wanted to hire someone to harm Fitzgerald in October 2008, four months before she became intimately involved with him, or that she was inquiring about having someone hurt him in February 2009, when she had just begun a romantic relationship with him.

Further, as the trial court noted, even if any or all of this evidence had been presented to the jury, it would not have changed the outcome. All of the newly discovered evidence went to S.P.'s credibility. However, S.P.'s credibility was significantly challenged during the trial. Yet, despite the fact that S.P. chose to invoke her Fifth Amendment rights and not testify as to some matters, the jury nevertheless believed M.V.'s testimony about what Fitzgerald had done to her on the night of May 18, 2009. Given that the evidence that Fitzgerald brought forward after the jury rendered its verdict went to S.P.'s motivations and credibility, and not to M.V.'s credibility, we conclude that the trial court did not abuse its discretion in denying Fitzgerald's motion for a new trial based on the newly discovered evidence.

As the trial court summarized, this was a case where the jury chose to believe the victim over the defendant. The trial court's conclusion that evidence of S.P.'s desire to have Fitzgerald harmed or her alleged tendency to fabricate accusations against him is not likely to have led to a different result on a retrial is a reasonable one that we will not disturb on appeal.

IV.

DISPOSITION

The judgment of the trial court is affirmed.

AARON, J.

WE CONCUR:

McCONNELL, P. J.

HALLER, J.